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COMMENTS

LEGISLATIVE SOLUTION TO A JUDICIAL DILEMMA: THE PENNSYLVANIA HOME IMPROVEMENT FINANCE ACT

I.

INTRODUCTION

The area of home modernization financing has presented numerous problems whose solutions have sometimes resulted in legal distortions. Courts have been faced with a demand for consumer protection on the one side and, on the other side, a corresponding demand for the free flow of commercial paper. Often, a strict and rigid adherence to one plea or the other has resulted in manifest injustice. Consider the following situation: A salesman after convincing two homeowners that they were desperately in need of new storm windows, induced them to execute a contract and accompanying judgment note (in blank) which was immediately completed and negotiated to a bank. Installation of the windows began shortly thereafter but the work was improperly done and the windows, as installed, did not conform to the contract. When the customers were later notified that payment was to be made to the bank, they complained that the windows were not as specified and refused to make the monthly payments when due. The bank immediately entered judgment upon the note.¹

This situation was not at all unusual, but judicial resolution was reluctant despite instances of the victimization of installment buyers with limited financial resources by unscrupulous salesmen. Although courts did not stand by completely idle,² there was a general desire for legislative reform. Newspaper exposés³ of unscrupulous, fly-by-night operators and complaints of constituents to their legislators, together with the tarnished "public image" of leading financial institutions all contributed somewhat to the ultimate passage of the much needed statute. "The bank which is the holder of an installment contract where one of the parties falls into either of these categories [a homeowner who is unduly particular or a profit-seeking contractor who is inclined to cut corners] unavoidably suffers criticism."⁴ Obviously, a large lending institution must maintain favorable

1. A petition to open the judgment was discharged upon the successful assertion by the bank that it was a holder in due course. *First Nat'l Bank v. Anderson*, 7 Pa. D.&C.2d 661 (C.P. Bucks County 1956).

2. See Part II, *infra*.

3. *E.g.*, Philadelphia Daily News, March 26, 1962, p. 22, col. 1.

4. Address by Anthony G. Felix, Jr., Esquire, Senior Vice-President and Secretary of The First Pennsylvania Banking and Trust Company, before Pennsylvania Bankers Association, November 21, 1963.

relations with its numerous customers and this was not an unimportant factor in launching the statute.

An examination of the situation in many jurisdictions not having similar statutes reveals many flaws in consumer protection as well as burdens placed upon financial institutions by judicial attempts at reaching equitable decisions.

II.

HOME IMPROVEMENT FINANCING PRIOR TO THE STATUTE

A. Generally

The common practice in financing sales, not only of home improvements, but also appliances, furniture, indeed almost all consumer goods, was the utilization of a conditional sale contract together with a negotiable note executed by the buyer and payable to the seller which would subsequently be transferred to the financing agency or bank, usually as part of a pre-arranged financing plan between the latter two parties. Often the contract and the note each formed a part of the same piece of paper, separated only by a perforated line. In the event of subsequent litigation, the transferee would claim the position of a holder in due course.⁵ This arrangement proved to be unsatisfactory both to consumer and financier.

B. Uniform Negotiable Instruments Law

Under the Negotiable Instruments Law there was some doubt that the negotiability of a note was not affected because it was executed in connection with a conditional sales contract.⁶ Generally, it may be said that such paper satisfied the requirement that it be a "courier without luggage."⁷

The problems arose when the courts had to determine whether the financing agency was a holder in due course.⁸ In efforts to protect the con-

5. See generally *Consumer Credit Symposium: Developments in the Law*, part VI, Finance Companies and Banks as Holders in Due Course of Consumer Installment Credit Paper, 55 Nw. U.L. Rev. 389 (1960). For an extensive discussion of the entire area, see 44 A.L.R.2d 8 (1955).

6. *Commercial Credit Corp. v. Orange County Machine Works*, 34 Cal. App. 2d 766, 214 P.2d 819 (1950). In some states, a note executed concurrently with a conditional sales contract was determined to be nonnegotiable: *Von Nordheim v. Cornelius*, 129 Neb. 719, 262 N.W. 832 (1935); *Federal Credit Bureau, Inc. v. Zekor Dining Car Corp.*, 238 App. Div. 379, 264 N.Y.S. 723 (1933); *Todd v. State Bank*, 182 Iowa 276, 165 N.W. 593 (1917). The opposite result was reached in *Thal v. Credit Alliance Corp.*, 78 F.2d 212 (D.C. Cir. 1935); *B.A.C. Corporation v. Cirucci*, 131 N.J.L. 93, 35 A.2d 36 (1944); *Motor Finance Corp. v. Huntsberger*, 116 Ohio St. 317, 156 N.E. 111 (1927).

Under Section 3 of the N.I.L., a promise to pay is unconditional [required for negotiability] within the meaning of the act, even though it is coupled with "(2) a statement of the transaction which gives rise to the instrument."

7. *Overton v. Tyler*, 3 Pa. 346, 347 (1846).

8. UNIFORM NEGOTIABLE INSTRUMENTS LAW § 52:

A holder in due course is a holder who has taken the instrument under the following conditions:

- (1) That it is complete and regular upon its face;
- (2) That he became the holder of it before it was overdue and without notice that it had been previously dishonored, if such was the fact;
- (3) That he took it in good faith and for value;
- (4) That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.

sumer, the decisions have engrafted numerous exceptions upon the doctrine of holder in due course, some of which have completely distorted its original meaning.

The first of these exceptions revolves around a finding of an agency relationship between the seller and the finance company. If such a relationship is found, the financier does not take the instrument without notice and consequently cannot be a holder in due course. In a case where the indorsee was found to be an interested party in the business of the indorser so that he was only a medium through which the indorser sought to avoid liability for the errors of its salesmen, judgment was given to the defendant buyer.⁹

A related theory, and, from the number of decisions, a more popular one with the judiciary, is to find the financier so closely related to the initial transaction as to become a party to it and thus subject to any defenses the maker might have to the instrument.

In an action in replevin brought by the financier against the purchaser of an automobile, judgment for the defendant was affirmed on the basis that the plaintiff, who prepared the instrument and took the assignment on the same day as the sale, which assignment was placed on the instrument even before it was executed, was for all purposes a party to the agreement and instrument from the beginning with a duty to inquire into the adequacy of the consideration.¹⁰ In finding that a finance company which had investigated the maker's credit, furnished the note and agreement containing its name and approved the terms of the note and agreement was actually a party to the transaction, the Florida Supreme Court said: "We think the buyer — Mr. & Mrs. General Public — should have some protection somewhere along the line. We believe the finance company is better able to bear the risk of the dealer's insolvency than the buyer and in a far better position to protect his interests against unscrupulous and insolvent dealers."¹¹ A somewhat more forceful statement appeared in a Buffalo City Court decision on similar facts:

It is obvious that here we have a factual joint enterprise in which, so far as conditional sales are concerned, the management rests in the far larger part in the hands of the finance companies. The finance company and the merchant-seller are as a fact engaged in one business, like Longfellow's description of man and woman, useless one without the other. To pretend that they are separate and distinct enterprises is to draw the veil of fiction over the face of fact.¹²

9. *McCurdy v. Stevens*, 30 Ohio App. 545, 165 N.E. 855 (1928). See also *Sisemore & Kierbow Co., Inc. v. Nicholas*, 149 Pa. Super. 376, 27 A.2d 473 (1942); *Titone v. General Electric Credit Corp.*, 108 N.Y.S.2d 909 (Sup. Ct. 1951). But see *Advance-Rumely Thresher Co. v. West*, 108 Kan. 875, 196 Pac. 1061 (1921); *Standard Motors Finance Co. v. Yellow Bayou Gin & Planting Co.*, 1 La. App. 424 (1925).

10. *Commercial Credit Co. v. Childs*, 199 Ark. 1073, 137 S.W.2d 260 (1940), noted in 53 HARV. L. REV. 1200 (1940). See Annot., 128 A.L.R. 726 (1940). The same result was reached in a similar fact situation in *Commercial Credit Corp. v. Orange County Machine Works*, 34 Cal. App. 2d 766, 214 P.2d 819 (1950), noted in 25 NOTRE DAME LAW. 358 (1950) and 23 So. CAL. L. REV. 580 (1950).

11. *Mutual Finance Co. v. Martin*, 63 So. 2d 649, 653 (Fla. 1953).

12. *Buffalo Industrial Bank v. DeMarzio*, 162 Misc. 742, 744, 296 N.Y.S. 783, 785, 786 (Buffalo City Ct. 1937), *rev'd on other grounds*, 6 N.Y.S.2d 568 (Sup. Ct. 1937).

Likewise, courts have found the indorsee to be in fact a party to the transaction where, in providing the forms for the underlying transaction, there has been a completion certificate required as a prerequisite to financing¹³ or a clause by which the buyer agrees to assert all claims against the seller alone and waives any and all defenses he might have against the financier.¹⁴ The latter promise, commonly known as a "cut-off clause", was held to be void as an attempt to make a nonnegotiable instrument negotiable by contract.¹⁵

In attempting to analyze cases of this type, one author has commented :

One reason, surely, is that the whole transaction as it is normally carried on is a sham. The transaction is really a loan by the financier to the buyer to enable him to buy a chattel from the seller. However, the papers are arranged in such a way that the loan is stated to be from seller to buyer, and the resulting debt is then said to be transferred to the financier. The transaction is not, in other words, what it appears to be. Whenever this is the case, there is always the possibility that a court can be talked into "piercing the veil", looking "through form to substance", etc.¹⁶

Another method occasionally utilized by courts who look kindly upon the consumer is that of the "single instrument", whereby the note and the contract are taken together, subject to defenses. Although knowledge of the existence of an executory contract is generally considered to be merely the suggestion of a potential equity which does not rise to the level of notice,¹⁷ occasionally the "single instrument" theory will be invoked and the holder will be treated as an assignee.¹⁸

One final method of relieving the consumer from his plight, which practice is prevalent in Pennsylvania, is the petition to open a judgment entered by confession. This has been held to be an equitable proceeding¹⁹ or one in the nature of an equitable proceeding²⁰ and in either case is

13. *Allied Bldg. Credits, Inc. v. Ellis*, 258 S.W.2d 165 (Tex. Civ. App. 1953).

14. *Public Nat'l Bank & Trust Co. v. Fernandez*, 121 N.Y.S.2d 721 (New York Munic. Ct. 1952).

15. *American Nat'l Bank v. Sommerville, Inc.*, 191 Cal. 364, 216 Pac. 376 (1923). "... an attempt to deprive an obligor of his contract defenses was in essence an attempt to create a negotiable instrument outside the framework of the NIL, and that the NIL was mandatory and all-inclusive and could not be circumvented by agreement. The waiver clause was void as against public policy." *Gilmore, The Commercial Doctrine of Good Faith Purchase*, 63 YALE L.J. 1057, 1096 (1954).

16. *Jones, Finance Companies as Holders in Due Course of Consumer Paper*, 1958 WASH. U.L.Q. 177, 183.

17. BRITTON, *BILLS AND NOTES*, § 108 and cases cited therein (2d ed. 1961).

18. *State Nat'l Bank v. Cantrell*, 47 N.M. 389, 143 P.2d 592 (1943); *Von Nordheim v. Cornelius*, 129 Neb. 719, 262 N.W. 832 (1935); *Federal Credit Bureau, Inc. v. Zekor Dining Car Corp.*, 238 App. Div. 379, 264 N.Y.S. 723 (1933). The latter case was criticized as being out of line with other authorities in New York and was not followed in *United States v. Novsam Realty Corp.*, 125 F.2d 456 (2d Cir. 1942). See also *Todd v. State Bank*, 182 Iowa 276, 165 N.W. 593 (1917).

19. *Stoner v. Sley System Garages*, 353 Pa. 532, 46 A.2d 172 (1946); *Perfect Bldg. and Loan Ass'n v. Mandel*, 345 Pa. 616, 29 A.2d 484 (1943); *Mutual Bldg. and Loan Ass'n v. Walukiewicz*, 322 Pa. 240, 185 Atl. 648 (1936).

20. *Smith v. Dale*, 405 Pa. 293, 175 A.2d 78 (1961); *Morrisville Shopping Center, Inc. v. Sun Ray Drug Co.*, 381 Pa. 576, 112 A.2d 183 (1955).

addressed to the sound discretion of the court, requiring a clear or manifest abuse of discretion for reversal. Thus, in *Ehnes v. Mang*,²¹ an order opening a confessed judgment upon the finding that the plaintiff was not a holder in due course of the judgment note was affirmed on the basis that there was no abuse of discretion.

Thus the courts, presumably out of pity for the consumer, have gradually weakened and eroded the position of finance companies which have made possible the mass distribution of consumer goods. But this has been the interpretation the courts have applied so that

[I]t is hard, and it becomes each year harder, for counsel to explain convincingly why "the law" requires that a hard-pressed wage-earner who has been bilked by a now-insolvent seller into buying junk masquerading as a television set or a washing machine must pay the full price to a bank or finance company whose own relationship with the fraudulent seller has been intimate, long-continued and profitable. The finance company must win "on the law" if it is to win at all.²²

At least one court, in determining the position of the indorsee of an instrument given in payment for goods received, chose to follow the law as written instead of judicial distortion:

The basis of those decisions is a feeling by the judiciary that, by using the Negotiable Instruments Law as a shield, the finance company is given an unfair advantage over the consumer buyer. There is undoubtedly some justification for this view, but steps to equalize their positions and regulate installment credit sales should be taken by the Legislature, and not by this court in view of the clear provisions of the Negotiable Instruments Law.²³

C. Uniform Commercial Code

With the advent of the Code, the rights of the financier were more clearly stated in the statute itself,²⁴ but the practical problem remained.

21. 170 Pa. Super. 155, 84 A.2d 518 (1951).

22. Gilmore, *The Commercial Doctrine of Good Faith Purchase*, 63 YALE L.J. 1057, 1098 (1954).

23. *White System of New Orleans, Inc. v. Hall*, 219 La. 440, 450, 53 So. 2d 227, 230 (1951). The decisions referred to by the court were those which refuse to recognize that finance companies may be holders in due course in installment credit sales.

24. UNIFORM COMMERCIAL CODE § 3-302: (1) A holder in due course is a holder who takes the instrument

(a) for value; and
(b) in good faith; and
(c) without notice that it is overdue or has been dishonored or of any defense against or claim to it on the part of any person.

UNIFORM COMMERCIAL CODE § 3-304: (4) Knowledge of the following facts does not of itself give the purchaser notice of a defense or claim

(b) that it was issued or negotiated in return for an executory promise or accompanied by a separate agreement, unless the purchaser has notice that a defense or claim has arisen from the terms thereof.

For a general comparison of the provisions of the NIL and the Code, see the following series of articles: Britton, *Formal Requisites of Negotiability — The Negotiable Instruments Law Compared with the Proposed Commercial Code*, 26 ROCKY MOUNT. L. REV. 1 (1953); Britton, *Transfers and Negotiations Under the Negotiable Instruments Law and Article 3 of the Uniform Commercial Code*, 32 TEXAS L. REV. 153

Thus, mere knowledge that the note had been given in payment for the sale and installation of a communications system which later proved defective did not defeat the plaintiff's position as a holder in due course in *Howard v. Biggs*²⁵ since there was no affirmative showing that he had actual knowledge of the breach when he acquired the note. The indorsee's rights were not defeated by failure of the payee's consideration even though the indorsee supplied the printed form of the sales contract with detachable note,²⁶ and even though the indorsee took the note under circumstances which ought to excite the suspicion of a prudent man but which were short of *actual* knowledge of any defects in the subject matter of the underlying contract.²⁷ The clear and unequivocal language of the Code together with the paucity of decisions applying it seem to indicate that the position of the financier is stronger in all but the most extreme position.²⁸ Thus where the makers of a note were persuaded to enter a "referral plan"²⁹ which would realize sufficient money to send their daughter to college, and the payees later disappeared, the indorsee was not found to be a holder in due course since the transaction was one "reeking with malodorous fraud."³⁰

It is easy to see that this situation was not satisfactory to either the consumer or the financing agency. Courts were faced with the problem of either following the law, which, in most cases would result in a decision for the holder, or looking to the equities which often favored the consumer. In any event, a variety of factors clearly indicated the need for reform in the area. Among these, an increasing number of consumer complaints to the Better Business Bureau, the local District Attorney, the Department of Banking, state legislators, together with an ever increasing volume of petitions to open judgments or complaints in equity to invalidate judgments as well as newspaper editorials and an increasing awareness by leading financial institutions that their public image was becoming tarnished, combined to produce the new statute.³¹

(1954); Britton, *Holder in Due Course — A Comparison of the Provisions of the Negotiable Instruments Law with Those of Article 3 of the Proposed Commercial Code*, 49 Nw. U.L. REV. 417 (1954); Britton, *Defenses, Claims of Ownership and Equities — A Comparison of the Provisions of the Negotiable Instruments Law with Corresponding Provisions of Article 3 of the Proposed Commercial Code*, 7 HASTINGS L.J. 1 (1955).

25. 378 P.2d 306 (Okla. 1962).

26. Park Nat'l Bank v. Motyl, 13 Mass. App. Dec. 67 (1957).

27. Atlas Credit Corp. v. Breslin, 58 Sch. L.R. 104 (C.P. Schuylkill County 1959); First Nat'l Bank v. Anderson, 7 Pa. D.&C.2d 661 (C.P. Bucks County 1955).

28. See UNIFORM COMMERCIAL CODE § 3-305.

29. Wall Street Journal, Oct. 10, 1963, pg. 1, col. 1.

30. Norman v. World Wide Distributors, Inc., 202 Pa. Super. 53, 195 A.2d 115 (1963). See also Mills v. World Wide Distributors, Inc., 202 Pa. Super. 59, 195 A.2d 118 (1963); Fidelity Trust Co. v. Gardiner, 191 Pa. Super. 17, 155 A.2d 405 (1959) (where note and completion certificate were fraudulently obtained).

31. In a personal interview on November 2, 1964, with Mr. Rudolph A. Biborosch, Vice-President of The First Pennsylvania Banking and Trust Company and a member of the committee which drafted the Home Improvement Finance Act, Mr. Biborosch stated that there was a definite need for legislation to protect the consumer from the tactics of fly-by-night operators whose actions constituted "flagrant violations of business ethics" and were also succeeding in placing financing agencies in a detrimental position in the eyes of their customers.

III.

STATUTORY REFORM — THE HOME IMPROVEMENT FINANCE ACT

A. *Scope*

In response to the need for balancing the various equities of a consumer who has a legitimate complaint, the honest contractor who is dealing with an unreasonable customer, and the financing agency who has acquired the paper for value, in good faith and without knowledge of the complaint, the Pennsylvania legislature passed the Home Improvement Finance Act, which became effective on January 1, 1964.³² Previously, in 1947, the Pennsylvania legislature passed the Motor Vehicle Sales Finance Act, applicable to retail sales of motor vehicles,³³ whose requirements protected the buyer and made him more fully aware of his rights and obligations under the contract. Now legislative protection has been extended into another area.

At the outset, it should be noted that, unlike a similar New York statute which applies to the sales of all chattels with the exception of motor vehicles,³⁴ the Home Improvement Finance Act covers the sale of goods and furnishing of services pursuant to a home improvement installment contract for the modernization, rehabilitation, repair, alteration or improvement of real property. Excluded from coverage are contracts for the construction of new homes; contracts for the sale of goods for purposes of improving real property in which the cash price is less than three hundred dollars (\$300.00); contracts which do not provide for payment of a time sale price, including, by definition, a finance charge, in installments; contracts covering only an appliance designed to be freestanding, such as a stove, freezer, refrigerator, or air conditioner and not built into and permanently affixed as an integral part of the structure, such as an air conditioner connected with a central heating system; contracts to improve real property used for commercial or business purposes; and a two party loan arrangement, by which a bank makes a personal loan to a customer who plans to use the proceeds to pay for an improvement to his home.³⁵

The remainder of this comment will be devoted to an examination of selected sections of the act together with a comparison with similar statutes enacted in other jurisdictions.

B. *Mandatory and Prohibited Contract Terms*

Among the mandatory contract terms are a statement of the contractor's name, place of business, identification of the property to be improved, a description of the goods and services to be furnished, the cash

32. PA. STAT. ANN. tit. 73, §§ 500-101-602 (Supp. 1964).

33. PA. STAT. ANN. tit. 69, §§ 601-637 (Supp. 1958). See generally 4 VILL. L. REV. 408 (1959).

34. N.Y. PERSONAL PROPERTY LAW §§ 401-19 (McKinney 1962).

35. PA. STAT. ANN. tit. 73, § 500-102 (7), (9), (10), (11), (16) (Supp. 1964).

price less down payment, and a statement of the amount of the finance charge expressed in dollars. The words "*Home Improvement Installment Contract*" must appear, in at least 10 point bold type, either at the top of the contract or directly above the line provided for the signature, together with a notice to the buyer, in at least 8 point bold type in the following language:

Notice to buyer: (1) Do not sign this contract before you read it. (2) You are entitled to a completely filled in copy of this contract. (3) Under the law, you have the right to pay off in advance the full amount due and, under certain conditions, to obtain a partial refund of the finance charge. (4) You may *rescind this contract*, subject to liability for any liquidated damage provision thereof authorized by law, *not later than five P.M. on the business day following the date thereof* by giving *written notice of rescission to the contractor at his place of business given in the contract*. . . . (Emphasis added).³⁶

These mandatory terms, particularly the right to rescind, offer the buyer ample protection against hasty and inconsiderate engagements induced by a clever salesman which, upon deeper reflection, would prove unwise. The one day "cooling off" period allows this time for reflection for ". . . people who are persuaded by persons whom they do not know to enter into contracts that they do not understand to purchase goods that they do not want with money that they have not got."³⁷

Among the prohibited terms are provisions by which the buyer waives defenses he might have against either the contractor or assignee, or allows the holder to arbitrarily and without reasonable cause accelerate maturity, or waives any tort claim arising out of collection efforts; or which entitle the seller to liquidated damages in excess of ten percent of the cash price in the event of rescission.³⁸

The purpose behind the mandatory and the prohibited terms is apparent. In a case involving a similar statute enacted in Maryland, the court said: "It reflects the view that improvident and careless consumers who buy on the installment plan need legal protection, since buyers ordinarily do not read their contracts and associated papers carefully."³⁹ However, Maryland is also sympathetic to the financier. In an action by the *assignee* of an installment sale contract in which the defense was raised by the buyer that his copy of the contract was not completely filled in since there was no signature by the authorized agent of the corporate seller, the court found for the assignee on the basis that the buyer, after executing an acknowledgment of receipt of a proper copy of a contract, would be estopped to deny it, saying: "It cannot be supposed that the legislature intended an applica-

36. PA. STAT. ANN. tit. 73, §§ 500-202, 203 (Supp. 1964). See Appendix in which a home improvement installment contract currently in use in the Philadelphia area is reproduced.

37. Anonymous judge cited in Hogan, *A Survey of State Retail Installment Sales Legislation*, 44 CORNELL L.Q. 38 (1958).

38. PA. STAT. ANN. tit. 73, § 500-206 (Supp. 1964).

39. *United States v. Bland*, 159 F. Supp. 395, 396 (D. Md. 1958).

tion of the exception which would seriously hinder the free assignability of retail installment agreements and thus drastically curtail the quantity of installment credit sales."⁴⁰

C. Negotiable Notes Prohibited

Perhaps the most important provisions of the Home Improvement Finance Act are those relating to the use of a promissory note in connection with the financing arrangement.⁴¹ The statute, although permitting the use of a promissory note, prohibits the use of a negotiable note by making payment subject to the terms of the contract⁴² and also by permitting the power to confess judgment against the maker *at any time*, even before default,⁴³ thus destroying the holder in due course position formerly assumed by the financing agency in these situations. Failure to include the required information upon the instruments used should result in their being unenforceable in the hands of an assignee for value. Stronger penalties are provided by the statute itself in the form of criminal sanctions for willful violation of its terms,⁴⁴ and civil actions brought by the Attorney General or local district attorney to enjoin violation.⁴⁵

D. Notice of Assignment and Buyer's Defenses

In order to alleviate the drastic curtailment of the use of negotiable notes in conjunction with home improvement financing, the legislature provided the financier with a method of obtaining an insulated status as a holder of the instrument free from defenses. This is achieved in the following

40. Associated Acceptance Corp. v. Bailey, 226 Md. 550, 556, 174 A.2d 440, 444 (1961).

41. PA. STAT. ANN. tit. 73, § 500-207 (Supp. 1964) provides:

- (a) No home improvement installment contract shall require or entail the execution of any note or series of notes by the buyer which, when separately negotiated, will cut off as to third parties any right of action or defense which the buyer may have against the contractor.
- (b) The contract may require or entail the execution of a promissory note but only if it bears on the same side of the note as contains the maker's signature, the following legend in at least ten point bold type: "Payment of this note is subject to the terms of a home improvement installment contract of even date between maker and payee." [See appendix.] No such note may be negotiated or otherwise transferred without simultaneous delivery of the related contract.

PA. STAT. ANN. tit. 73, § 500-406 (Supp. 1964), provides that the note given in conjunction with the improvement contract may contain a power of attorney to confess judgment which may be exercised by the holder before default.

42. UNIFORM COMMERCIAL CODE § 3-105(2): "... A promise or order is not unconditional [required for negotiability by § 3-104(1-b)] if the instrument (a) states that it is subject to or governed by any other agreement. . . ."

43. It has been held that section 3-104(1)(b) of the Uniform Commercial Code which provides that an instrument to be negotiable must contain an unconditional promise or order to pay a sum certain in money and *no other* promise, order, obligation or *power except as is authorized by the code* mitigates against negotiability when the power to confess judgment may be exercised at any time instead of being limited to events of default as permitted by section 3-112(1)(d). Atlas Credit Corp. v. Leonard, 15 Pa. D.&C.2d 292 (C.P. Lancaster County 1957), discussed briefly in Del Duca, *Commercial Code Litigation*, 66 DICK. L. REV. 39, 40 (1961).

44. PA. STAT. ANN. tit. 73, § 500-501 (Supp. 1964).

45. PA. STAT. ANN. tit. 73, § 500-502 (Supp. 1964).

manner: upon acquiring the note and contract, the assignee must give notice of the assignment to the buyer and this notice, in addition to the names and addresses of the parties involved, the subject matter of the contract, the number and amount of installments in which the time balance is payable and the due dates must contain the following legend in at least eight point bold type:

Notice:

1. If the within statement of your transaction with the contractor is not correct in every respect; or
2. If the goods and services described in or in an enclosure with this notice have not been delivered and satisfactorily performed by the contractor; or
3. If the contractor has not *fully* performed all his agreements with you, *you must notify the assignee in writing* at the address indicated in or in an enclosure with this notice *within fifteen days* from the date of the mailing of this notice; *otherwise, you will have no right to assert against the assignee any right of action or defense arising out of the sale* which you might otherwise have against the contractor.⁴⁶ (Emphasis added.)

Presumably, the statutory language which requires that the contract be *fully* performed will guard against the possibility of a contractor doing a workmanlike but incomplete job and then, after fifteen days, obtaining the contract price and absconding. This provision imposes the duty of inquiry upon the financier to see that the underlying contract has been completely and satisfactorily performed, a duty which has been termed an almost insurmountable burden on the free flow of commercial paper.⁴⁷ It is difficult to see how the insertion of the required notice into an envelope, together with the other papers, coupon book, etc. which would be directed to the consumer anyway, would impose a burden upon the financing agency. However, due to the magnitude of the operations of some financial institutions, some problems could develop when a contract is unsatisfactorily performed and notice to that effect returned by the customer within fifteen days. If the notice is misdirected, payment to the dealer may already have been made or a protective judgment entered against the makers. Even if this had not happened, a bank employee would have to investigate the complaint, which may often prove to be groundless, and, if legitimate, see that corrective measures are taken. This would seem to place the financier in the middle of the home improvement business.

On the other hand, it is quite possible that the consumer will either fail to read the notice of assignment and statement of his rights or will "file" it away for future reference.

46. PA. STAT. ANN. tit. 73, § 500-208 (Supp. 1964). New York only allows the buyer ten days within which to give notice. N.Y. PERSONAL PROPERTY LAW § 403(3) (McKinney 1962).

47. Atlas Credit Corp. v. Breslin, 58 Sch. L.R. 104 (C.P. Schuylkill County 1959); First Nat'l Bank v. Anderson, 7 Pa. D.&C.2d 661 (C.P. Bucks County 1955).

After taking the assignment, the financing agency may select one of three alternatives regarding the availability of the proceeds of discount to the contractor. One would be to pay over the entire proceeds to the contractor immediately upon discount, with the understanding that the contractor will take remedial steps or repurchase the contract in the event a notice of claim is received from the buyer within fifteen days. This could be done when the relationship between financier and contractor has been long and favorable. A second alternative, more likely to be employed when first dealing with a new contractor, would be to hold back any payment until the fifteen day notice period has passed without incident. A final possibility would be to retain a percentage of the discount proceeds until after the fifteen day period, thus advancing enough to the contractor to pay his costs while retaining part of the proceeds as a reserve to cover the costs of remedying any possible defects.⁴⁸

As far as the financier is concerned, assuming that the fifteen day notice period elapses with no claims made by the customer, it should be in a stronger position than under prior practices when the courts were able to justify decisions for the consumer. Although the financier can no longer be a holder in due course, he should be insulated from defenses by the buyer on the theory of estoppel.⁴⁹ Consequently, by failing to raise a defense within the fifteen day notice period, the buyer should be compelled to forever hold his peace. This should provide a clean cut fact situation in the event of litigation under the statute.⁵⁰

E. Miscellaneous Provisions

In addition to the substantial changes in the law of home improvement sales financing effected by the previously discussed provisions, the legislature has provided several other protections to prevent the consumer from being bilked by the unscrupulous salesman. First of all, the maximum finance charge on a home improvement installment contract may not exceed eight dollars per one hundred dollars per year⁵¹ where previously there was no regulation other than usury laws so that finance charges amounted to whatever the traffic would bear.

48. Address by Anthony G. Felix, Jr., Esquire, Senior Vice-President and Secretary of The First Pennsylvania Banking and Trust Company, before Pennsylvania Bankers Association, Nov. 21, 1963.

One Philadelphia bank forwards payment to their established dealers immediately, while waiting for the fifteen day notice period to elapse before paying new accounts. Interview, *supra* note 31.

49. "... estoppel is a bar which precludes a person from denying or asserting anything to the contrary of that which has, in contemplation of law, been established as the truth, . . . by his own deed or representations, either express or implied." 19 AM. JUR. ESTOPPEL § 2 (1939).

50. See generally *Legislative Regulation of Retail Installment Financing*, 7 U.C.L.A.L. REV. 623, 752-54 (1960).

51. PA. STAT. ANN. tit. 73, § 500-301 (Supp. 1964). Compare N.Y. PERSONAL PROPERTY LAW, § 404(1-a) (McKinney 1962), ten dollars per hundred dollars per year; N.J. STAT. ANN. tit. 17, §§ 17:16C-69 (1963), seven dollars per hundred dollars per year.

A more significant protection of the consumer from his folly is the prohibition of buyer rewards in excess of the value of two dollars and fifty cents⁵² as well as an unequivocal renunciation of the ever-popular referral plan⁵³ through which consumers were promised rewards or discounts for inducing others to enter a similar plan or contract thus becoming, in reality, an integral part of the contractor's sales force. The object was to prevent such situations as:

The referral plan was a fraudulent scheme based on an operation similar to the recurrent chain letter racket. It is one of many sales rackets being carried on throughout the nation which are giving public officials serious concern. The plaintiffs introduced evidence to show that at the end of 20 months of operation, it would require 17 *trillion* salesmen to carry on a referral program like World Wide described to the plaintiffs.⁵⁴

This section of the statute is indeed one of the most beneficial since it provides a strong deterrent against one of the most lowly rackets practiced by the "suede-shoe" operator, a glib-tongued pitchman who is here today and gone tomorrow, leaving just after he has discounted the note with a finance company.

Finally, one regulation, aimed at tightening up the enforcement of the act, would have required licensing of both contractors and financing agencies, which license would have been revoked for willful failure to comply with the procedures of the act or even for demonstration of lack of financial responsibility.⁵⁵ This failed to gain legislative approval, however, and the actual policing of the act is effected through both criminal and civil sanctions.⁵⁶

IV.

CONCLUSION

In general, it may be said that two disadvantages may result from this type of installment sales regulation. The first is the retardation of installment selling. The second is that the practical effects intended by the drafters will be thwarted by unscrupulous individuals who have a talent for evasion of the law.⁵⁷ Statistics have indicated that, among fraudulent contractors and salesmen, the offenders were few but repeated.⁵⁸

At this time, there have been no reported cases decided under the Home Improvement Act. The National Established Repair, Service, Improvement Contractors Association (NERSICA) was planning to chal-

52. PA. STAT. ANN. tit. 73, § 500-404(c) (Supp. 1964).

53. PA. STAT. ANN. tit. 73, § 500-404(a) (Supp. 1964).

54. Norman v. World Wide Distributors, Inc., 202 Pa. Super. 53, 57, 195 A.2d 115, 117 (1963).

55. The New Jersey statute has such a licensing requirement. N.J. STAT. ANN. tit. 17, §§ 17:16C-77-17:16C-84 (1963).

56. PA. STAT. ANN. tit. 73, §§ 500-501, 502 (Supp. 1964).

57. See generally Hogan, *supra* note 37.

58. 41 Chi. B. Record 285 (1959).

lenge the law as "ambiguous and discriminatory", claiming that there was only a small percentage of contractors who were to blame for defective work and that the law would lead to a rash of unjustified complaints and cancellation, but to date no action has been commenced.⁵⁹

In *theory*, the Pennsylvania Home Improvement Finance Act is a great *improvement itself* over the previous situation. One drafter has stated that the consumer has gained a great deal of protection from the opportunity for rescission, the uniformity of finance charge rates, and the opportunity to have defective work corrected.⁶⁰ Admittedly, this is so. Also, in *theory*, financing agencies occupy a stronger position (after the fifteen day notice period has expired) than they did previously when they were more or less at the "equitable" mercy of a judge. Compliance with the statutory provisions is final and *conclusive* proof of the financier's insulated position as an assignee for value, free of all defenses.

At this time, after almost one year's experience under the Home Improvement Act, only about one per cent of the contracts assigned to one Philadelphia bank have been repurchased by the dealer.⁶¹ The number of *groundless* complaints from meticulous customers who recognize a good thing when they see it are not known. It is submitted that the Act is *overly protective* of the consumer at the expense of the financier who now has the burden of policing the performance of the contract. This theory is unsupported at present and only time and judicial interpretation will determine whether, in an attempt to provide protection where it was sorely needed, the legislature tipped the scales too far to the detriment of the financier.

Edward Gerald Donnelly, Jr.

59. Newman, *Who's to Blame in Home Frauds?*, The Evening Bulletin, Oct. 24, 1963, p. 34, col. 7.

60. Interview, *supra* note 31.

61. *Ibid.* This is the result of a selective policy in choosing certain dealers as sources for home improvement paper.

APPENDIX

(Front of Contract)
HOME IMPROVEMENT INSTALLMENT CONTRACT
 (ORIGINAL TO Penco)

Date....., 19....

Contractor's Name and
 Place of Business.....

Buyer's Name and
 Address.....

Co-Buyer's Name and
 Address.....

Name	No.-Street	City	County	State
.....
.....
.....

Contractor agrees to sell and Buyer (which means Buyer and all Co-Buyers who sign below, jointly and severally) agrees to buy the following goods and services, which are to be furnished or used in the modernization, rehabilitation, repair, alteration or improvement of the real property located at Buyer's address given above or at

No.-Street	City	County	State
.....

Description of Goods and Services

for a time sale price computed as follows:

1. Cash Price of the goods and services (including taxes) - - - \$.....
2. Down Payment:
 - Cash - - - - - \$.....
 - Trade-in (Describe) - - - - - \$.....
 - Allowances (Describe) - - - - - \$.....
3. Unpaid Cash Balance (Difference between Items 1 and 2) - - - \$.....
4. Group Credit Life Insurance to be procured by Contractor.
 (...) Yes (...) No
 If "yes" see Notice of Proposed Group Credit Life Insurance on reverse side hercof.
 If "yes" and a separate charge is to be made therefore the charge is - - - \$.....
5. Other types of insurance (describe coverage, term and cost of each) \$.....
6. Official Fees - - - - - \$.....
7. Principal Amount Financed (Sum of Items 3, 4, 5 and 6) - - - \$.....
8. Finance Charge - - - - - \$.....
9. Time Balance (Sum of Items 7 and 8) - - - - - \$.....
10. Time Sale Price (Sum of Items 2 and 9) - - - \$.....

Buyer agrees to pay the Time Balance: (a) in successive monthly installments of \$..... each or (b) in accordance with the Payment Schedule on the back of this Contract if the Time Balance is payable in other than successive monthly installments. The first installment is payable on 19...., or if no date is specified, on a date (notice of which shall be given to Buyer) not later than 120 days following the date Contractor has furnished the goods and services covered hereby, and the remaining installments are payable on the same day of the month as the first installment. All such installment payments shall be paid promptly on their respective due dates (time being of the essence) at any office of THE FIRST PENNSYLVANIA BANKING AND TRUST COMPANY or such other place as the holder hereof ("Holder" as used in this Contract means the Contractor or anyone claiming under or through the Contractor and currently entitled to his rights) may designate. Upon the failure of Buyer to make any installment payment when and where due, or upon occurrence of any other event of default, the Holder, at its option, may declare the entire amount remaining unpaid hereunder to be immediately due and payable.

(If any installment substantially exceeds in amount any prior installment complete the following:)

THIS CONTRACT IS NOT PAYABLE IN INSTALLMENTS OF EQUAL AMOUNTS; AN INSTALLMENT OF \$..... WILL BE DUE ON, 19....;

(or if there be more than one larger installment)

LARGER INSTALLMENTS WILL BE DUE AS FOLLOWS:
 (insert amount and due date of each)

If prior to the time the Contractor starts performance of this Contract Buyer fails or refuses to accept delivery of the goods or performance of the services covered hereby, Buyer agrees to pay to Contractor as liquidated damages an amount equal to ten percent (10%) of the Cash Price stated herein. This contract, subject to liability for any liquidated damage provision thereof authorized by law, may be rescinded by the Buyer not later than five p.m. on the business day following the date thereof by giving written notice of rescission to the Contractor at his place of business given in this contract, but if Buyer rescinds after five p.m. on the business day following, Buyer is still entitled to offer defenses in mitigation of damages and to pursue any rights of action or defenses that arise out of the transaction.

Any right of action or defense arising out of the transaction which gave rise to this Contract which Buyer has against Contractor shall be cut off by assignment of this Contract to any third person if the assignee gives notice of the assignment to Buyer as

provided in Section 208 of the Home Improvement Finance Act (Pennsylvania) and within fifteen days of the mailing of such notice receives no written notice of the facts giving rise to the claim or defense of the Buyer.

Each Buyer and Co-Buyer, jointly and severally, hereby authorizes and empowers the Prothonotary, Clerk or any attorney, of any court of record within the United States or elsewhere, at any time, to appear for each Buyer and/or Co-Buyer and to confess judgment as often as necessary against each Buyer and/or Co-Buyer and in favor of the Holder, as of any term, with or without declaration filed for such sum or sums as may be payable hereunder with costs of suit and with 20% added as attorney's fees. With respect to any judgment entered hereon, each Buyer and Co-Buyer releases all errors and waives all rights of appeal, appraisal, stay of execution, inquisition and exemption under any law now or hereafter in force, and each hereby agrees that real estate may be sold under a writ of execution and voluntarily condemns the same and authorizes the Prothonotary or Clerk to enter said condemnation on such writ; and each Buyer and Co-Buyer agrees that a true copy hereof, verified by affidavit made by the Holder or someone acting on its behalf, may be filed in such proceeding in lieu of filing the original as warrant of attorney, any rule of court, custom or practice to the contrary notwithstanding.

This contract is subject to the additional provisions including the Notice of Proposed Group Credit Life Insurance, set forth on the reverse side hereof, the same being incorporated herein by reference.

Notice to Buyer: (1) Do not sign this contract before you read it. (2) You are entitled to a completely filled-in copy of this contract. (3) Under the law you have the right to pay off in advance the full amount due and under certain conditions to obtain a partial refund of the finance charge. (4) You may rescind this contract subject to liability for any liquidated damage provision thereof authorized by law not later than five p.m. on the business day following the date hereof by giving written notice of rescission to the contractor at his place of business given in the contract, but if you rescind after five p.m. on the business day following you are still entitled to offer defenses in mitigation of damages and to pursue any rights of action or defenses that arise out of the transaction.

Contractor's signature set forth below shall also operate as Contractor's execution of the Contractor's Assignment on the reverse side hereof.

In Witness Whereof, the parties hereto have signed this contract the above date.

..... (L.S.) (L.S.)
Contractor	Buyer (Person to be covered by Group Credit Life Insurance if any)
By (L.S.)
Signature and Title	Co-Buyer

\$....., 19....
(Total of Note) (City) (County) (State) (Date)

Undersigned, jointly and severally if more than one, promise to pay to the order of
(Name of Contractor)

..... Dollars
(a) in successive monthly installments of \$..... each and a final monthly installment of \$....., the first installment to be payable on the day of 19...., and the remaining installments to be paid on a like day of each succeeding month thereafter; or (b) in accordance with the payment schedule on the reverse side hereof. Said installments to be made at any office of THE FIRST PENNSYLVANIA BANKING AND TRUST COMPANY, or such other place as the holder hereof may designate, with interest after default at the highest lawful rate. In case of the failure of the undersigned to pay any installment hereunder when and where due, the holder hereof, at his option may declare the entire amount of this note then remaining unpaid, immediately due and payable, and proceed to collect the same.

Undersigned agrees to pay a delinquency and collection charge for each default in payment which continues for a period of ten (10) days or more in an amount equal to 5% of the amount of the installment in default or \$5.00 whichever is less. If the holder hereof refers this note to an attorney (not a salaried employee of such holder) for collection, undersigned agree to pay as attorney's fees a sum equal to 20% of the amount due and payable under this note plus court costs actually incurred.

As security for the payment of this note undersigned, jointly and severally, hereby authorize and empower the Prothonotary, Clerk or any attorney, of any court of record within the United States or elsewhere, at any time, to appear for them or any of them and to confess judgment against them or any of them in favor of the holder hereof, as of any term, with or without declaration filed for the total amount of this note and with costs of suit and with 20% added as attorney's fees. With respect to any judgment entered hereon, each of the undersigned releases all errors and waives all rights of appeal, appraisal, stay of execution, inquisition and exemption under any law now or hereafter in force, and each hereby agrees that real estate may be sold under a writ of execution and voluntarily condemns the same and authorizes the Prothonotary or Clerk to enter said condemnation on such writ. Each of the undersigned and all endorsers waive protest of this note, notice of protest, or notice of dishonor of any kind.

Payment of this note is subject to the terms of a home improvement installment contract of even date between maker and payee.

..... (Address) (Signature) (Seal)
..... (Address) (Signature) (Seal)